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Asmelash, Henok

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# The WTO dispute settlement system as a forum for climate litigation?

Henok Asmelash 

Birmingham Law School, University of Birmingham, Birmingham, UK

## Correspondence

Henok Asmelash, Birmingham Law School, University of Birmingham, Birmingham B15 2TT, UK.

Email: [h.b.asmelash@bham.ac.uk](mailto:h.b.asmelash@bham.ac.uk)

## Abstract

This article examines whether and to what extent the dispute settlement system (DSS) of the World Trade Organization (WTO) could and should serve as a venue for international climate litigation. The article tackles these questions in three parts. First, it maps the nature and features of a trade-related climate litigation. Second, it considers the prospect of such litigation under existing substantive and procedural rules of the WTO. Third, it investigates whether the WTO DSS should serve as a venue for climate litigation. The article finds that while the prospect of pro-climate litigation remains limited, anti-climate litigation is likely to increase, and that the DSS is an appropriate venue for adjudicating such disputes.

## 1 | INTRODUCTION

The emergence of litigation as one of the key strategies in the fight against climate change, and the continued inadequacy of international climate action has prompted considerable interest in the role of international courts and tribunals over the last few years.<sup>1</sup> One of the international courts and tribunals at the forefront of this rising interest is the dispute settlement system (DSS) of the World Trade Organization (WTO).<sup>2</sup> The DSS has been at the heart of the trade and environment debate that dominated the multilateral trading system over the last three decades. Its decisions in high-profile trade and environment disputes such as *US–Gasoline*, *US–Shrimp* and *Brazil–Retreaded Tyres* have shaped the nature and direction of the debate on the interaction

between trade and the environment.<sup>3</sup> The now-defunct Appellate Body particularly made crucial jurisprudential moves in these disputes that helped create or maintain the policy space of governments to pursue environmental protection goals.<sup>4</sup> However, its role (and that of the DSS more generally) has been limited mostly to the interpretation of environmental exceptions contained in WTO agreements. Most of the trade and environment disputes were also neither specific to climate change nor filed out of concern to protect the environment. They were disputes brought against trade-restrictive or trade-distortive environmental measures driven by trade concerns. This means that the DSS remains mostly untested as a venue for international climate change litigation. Against this background, this article examines whether and to what extent the DSS could and should serve as a forum for international climate change litigation. For the purpose of this article, trade-related climate litigation refers to litigation that involves trade measures that either strengthen or weaken climate action. Such litigation can be classified as pro-climate and anti-climate action litigation. Trade-related climate litigation against the lack

<sup>1</sup>See I Alogna, C Bakker and JP Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill 2021); D Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections' (2017) 49 *Arizona State Law Journal* 689; K Boom, 'The Rising Tide of International Climate Litigation: An Illustrative Hypothetical of Tuvalu v Australia' in RS Abate and EA Kronk (eds), *Climate Change and Indigenous Peoples* (Edward Elgar 2013) 409; A Strauss, 'Climate Change Litigation: Opening the Door to the International Court of Justice' in HM Osofsky and WCG Burns (eds), *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge University Press 2009).

<sup>2</sup>See H van Asselt, 'Trade and Climate Disputes before the WTO: Blocking or Driving Climate Action?' in Alogna et al (n 1) 433; N Silva-Send, 'Climate Change Disputes at the World Trade Organization: National Energy Policies and International Trade Liability' (2012) 4 *San Diego Journal of Climate and Energy Law* 195.

<sup>3</sup>See K Kulovesi, 'Real or Imagined Controversies? A Climate Law Perspective on the Growing Links between the International Trade and Climate Change Regimes' (2014) 6 *Trade Law and Development* 55.

<sup>4</sup>On the role of the now defunct Appellate Body, see R Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27 *European Journal of International Law* 9.

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(or inadequacy) of climate-friendly trade measures or the adoption of climate-unfriendly trade measures are considered pro-climate action litigation whereas litigation against climate-friendly trade measures are considered to anti-climate action litigation.

Contrary to recent literature that casts doubt on the ability and mandate of the WTO and its DSS to address climate change and other environmental concerns, this article argues that both the organization and its dispute resolution mechanism remain appropriate venues for tackling trade-related climate change issues.<sup>5</sup> Here the term 'appropriate' is taken in a broader sense to refer to the relevance and suitability of a judicial forum for climate change litigation. The climate litigation literature has not yet identified clear criteria or framework to assess the appropriateness of a court or tribunal to serve as a forum for climate litigation. However, a review of the literature on climate litigation and dispute settlement reveals that a wide range of factors are significant in determining the appropriateness of a judicial forum for the adjudication of a particular dispute. Such factors include mandate or jurisdiction, subject-matter expertise, enforcement mechanism and compliance record, remedies, and time and costs of proceedings.

Some of these factors are particularly relevant for international climate litigation. First, jurisdiction (both subject matter and personal) is crucial given that most international courts and tribunals have relatively limited jurisdiction (often confined to the interpretation of specific legal instruments).<sup>6</sup> International courts and tribunals with broad and compulsory jurisdiction are more suitable for climate litigation as the underlying claims may not necessarily fall squarely within a particular legal instrument.<sup>7</sup> Second, an equally important factor is the strength of the enforcement mechanism.<sup>8</sup> This is because climate litigation is mostly aimed at inducing policy change or enforcement of existing commitments. Third, the expertise of the court on the subject matter of the dispute is also essential to its appropriateness. Van Asselt, for example, considered the climate-related expertise of the adjudicators in assessing the merits of adjudicating trade-related climate change issues at the WTO.<sup>9</sup> Finally, the literature also considers effectiveness and performance to assess the prospects of climate litigation before a particular court. Milaninia and Aparac, for example, considered, inter alia, the overall performance, length of proceedings and resources of the court in assessing the prospect of climate litigation before the International Criminal Court.<sup>10</sup> Consideration of all

these factors in light of the close interaction between international trade law and climate change, the decades-long experience of the DSS in balancing between trade and nontrade concerns, its relative effectiveness and environmental jurisprudence makes the DSS an appropriate forum for trade-related international climate change litigation.

Recognizing and utilizing the DSS as a forum for international climate litigation has significant implications for efforts to tackle climate change through litigation. In the absence of a comprehensive and integrated set of rules addressing all aspects of climate change and a single international forum dedicated to climate litigation, a multiforum approach remains the most practical way forward for international climate litigation.<sup>11</sup> Climate change is also a complex and multidimensional phenomenon that transcends existing legal boundaries. It is therefore imperative that judicial bodies across different regimes of international law are put to the service of tackling climate change. Climate litigation before one of the most prominent international courts and tribunals with a relatively high rate of compliance and influence is critical to ensuring the mutual supportiveness of trade and climate change policy. In considering the advantages of climate litigation before the International Court of Justice (ICJ), Strauss noted that 'a favourable ruling by the ICJ could provide an authoritatively sanctioned reference point around which public opinion can crystallize by imbuing that claim with the official imprimatur of law'.<sup>12</sup> The DSS has a similar influence on issues related to international trade. Clarity around the nature and prospects of trade-related climate litigation would also help WTO members consider ways of tackling climate change through the DSS.

The article is structured in five sections. Section 2 maps the nature and features of trade-related climate litigation. Section 3 examines the likelihood of climate litigation at the WTO. To be sure, the DSS is not the only forum for trade-related climate litigation. The deadlock in multilateral trade negotiations over the last two decades has led to the proliferation of preferential trade agreements (PTAs) with in-built dispute settlement systems. Most of these PTAs contain provisions specific to climate change—some even have environmental or sustainable development chapters.<sup>13</sup> These provisions provide solid grounds for climate litigation. However, with a few recent exceptions, the dispute settlement systems of PTAs are mostly dormant.<sup>14</sup> Despite the ongoing crisis that led to the demise of the Appellate

<sup>5</sup>See S Charnovitz, 'A Better Transatlantic Agenda on Trade and Environment' (Carleton University 2021); van Asselt (n 2).

<sup>6</sup>See B Kingsbury, 'International Courts: Uneven Judicialisation in Global Order' in J Crawford and M Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 203. See also A Weinbaum, 'Unjust Enrichment: An Alternative to Tort Law and Human Rights in the Climate Change Context?' (2011) 20 *Washington International Law Journal* 429, 443 (associating appropriateness of a court to its jurisdiction).

<sup>7</sup>See D Raju et al, 'Multi-Forum Strategies to Tackle Climate Change and Other Complex Problems: A Note from Practitioners' (EJIL:Talk!, 1 November 2022).

<sup>8</sup>See DR Bartram, 'International Litigation Over Global Climate Change: A Sceptic's View' (2007) 10 *Proceedings of the Annual Meeting of the American Society of International Law* 65.

<sup>9</sup>See van Asselt (n 2) 458. See also N Milaninia and J Aparac, 'Climate Change Litigation before the International Criminal Court: Prospects in Theory and Practice' in Alogna et al (n 1) 481, 483 (considering expertise in 'environmental crimes' in their assessment of the prospects of climate litigation before the International Criminal Court).

<sup>10</sup>See Milaninia and Aparac (n 9).

<sup>11</sup>See Raju et al (n 7).

<sup>12</sup>Strauss (n 1) 337. See also Bodansky (n 1) 711 (noting that '[a]n I.C.J. decision on the issue of compensation could help influence national litigation in the nearer term and change expectations regarding the potential for future international litigation in the longer term').

<sup>13</sup>See JB Velut et al, 'Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements' (2022); A Berger, C Brandt and D Bruhn, 'Environmental Provisions in Preferential Trade Agreements: Comparing the European and Emerging Markets' Approach' in A Negi, J Antonio Pérez-Pineda, and J Blankenbach (eds), *Sustainability Standards and Global Governance* (Springer 2020) 61.

<sup>14</sup>See G Vidigal, 'Why Is There So Little Litigation under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement' (2017) 20 *Journal of International Economic Law* 927; S Falls, 'Barriers to Panel Composition in RTA Dispute Settlement: Evaluating Solutions to a Perennial Problem' (2022) 21 *World Trade Review* 1. For recent developments, see G Vidigal, 'Regional Trade Adjudication and the Rise of Sustainability Disputes: Korea—Labor Commitments and Ukraine—Wood Export Bans' (2022) 116 *American Journal of International Law* 567; Dem van 't Wout, 'The Enforceability of the Trade and Sustainable Development Chapters of the European Union's Free Trade Agreements' (2022) 20 *Asia Europe Journal* 81.

Body, the DSS remains one of the most active international courts and tribunals. WTO members filed 20 new cases since the Appellate Body became dysfunctional on 11 December 2019.<sup>15</sup> A group of WTO members have also created the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) pursuant to Article 25 of the Dispute Settlement Understanding to keep appellate review alive in the absence of the Appellate Body.<sup>16</sup> Section 4 responds to the question whether the DSS should serve as a venue for international climate litigation. Section 5 concludes the discussion by considering ways of further strengthening the DSS.

## 2 | TRADE-RELATED CLIMATE LITIGATION

Understanding the type of claims and legal issues that may arise in climate litigation in the international trade regime is important to understanding whether the DSS could and should serve as a venue for international climate litigation. Climate litigation is a relatively new phenomenon that has no commonly agreed definition.<sup>17</sup> What counts as 'climate litigation' remains the subject of much debate and different scholars use different definitions, mostly depending on whether climate change is a central or peripheral issue in the case. Alogna et al. categorized the definitions used in international legal scholarship into narrow and broad definitions.<sup>18</sup> The narrow definitions confine climate litigation to 'litigation which directly and expressly raises an issue that is related to climate change or climate change policy'.<sup>19</sup> Climate litigation exists under these definitions only insofar as the parties directly and expressly raise an issue of fact or law related to climate change. The broad definitions of climate litigation encompass not only cases where climate change is a central issue but also cases in which it is a peripheral concern.<sup>20</sup> Such definitions capture cases that have implications for climate change even if there is no explicit reference to climate change in the proceeding or decision. Such definitions are more suitable to international climate litigation outside the climate change regime where climate change is less likely to form the core component of the dispute. However, adopting an implication-based definition requires some caution.<sup>21</sup> This is because the nature of climate change is such that almost all litigation has some climate change implication.<sup>22</sup> The unqualified use of the implication-based

definition will turn virtually all trade disputes into climate litigation as they are likely to have at least indirect implications for climate change. It is therefore important to identify the key features of trade-related climate litigation.

At the most basic level, trade-related climate litigation comprises a trade component. This means that such litigation involves a trade measure that either strengthens or weakens climate action. The interaction between trade and climate change and the role of international trade in climate change is the subject of a long-standing debate that lies beyond the scope of this article. However, there is little disagreement over the presence of close ties between trade and climate change.<sup>23</sup> The Intergovernmental Panel on Climate Change (IPCC) recently noted that 'policies to open up trade can have a range of effects on GHG emissions, just as mitigation policies can influence trade flows among countries'.<sup>24</sup> The prevailing view in the trade and climate change literature is that trade presents both opportunities and obstacles to addressing climate change.<sup>25</sup> On the one hand, there are a broad range of trade measures that can help countries to mitigate and adapt to climate change. Several parties to the Paris Agreement also included some of these trade measures in their nationally determined contributions (NDCs).<sup>26</sup> These measures include renewable energy subsidies, border carbon adjustments (BCAs), import bans, standard and labelling schemes, etc. The WTO Environmental Database (EDB) also shows that an increasing number of WTO members are submitting environment-related notifications containing climate change-related trade measures.<sup>27</sup> In 2020, for example, WTO members submitted 827 environment-related notifications containing around 1391 separate environment-related trade measures.<sup>28</sup> Most of these measures were technical regulations or specifications (46.9%), import licences (20.5%), import bans/prohibitions (14.9%), export licences (10.7%), nonmonetary support (9.8%) and grants and direct payments (7.8%).<sup>29</sup> These measures have a broad range of environmental objectives from climate change mitigation and adaptation to air pollution reduction, energy efficiency and conservation and promotion of renewable energy.<sup>30</sup>

On the other hand, trade measures such as the liberalization of trade in carbon-intensive products (e.g. fuels, metals, fertilizers and cement) and the imposition of tariffs and nontariff barriers on renewable energy technologies tend to either contribute to climate change or undermine efforts to overcome its impacts.<sup>31</sup> Trade rules governing the

<sup>15</sup>See WTO, 'Chronological List of Disputes Cases' <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm)>.

<sup>16</sup>The MPIA entered into force on 30 April 2020 with 19 parties (counting the European Union as one) and the number of parties has increased to 25 since then. See WTO, 'Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes' JOB/DSB/1/Add.12 (30 April 2020). For the latest on the MPIA, see A Sakhi and AM Gonzalez, 'The Multi-Party Interim Appeal Arbitration Arrangement: An Update' (2022) 17 *Global Trade and Customs Journal*.

<sup>17</sup>See I Alogna, C Bakker and JP Gauci, 'Climate Change Litigation: Global Perspectives: An Introduction' in Alogna et al (n 1) 1, 15.

<sup>18</sup>*Ibid.*

<sup>19</sup>*Ibid.*

<sup>20</sup>*Ibid.* 16.

<sup>21</sup>See CJ Hilson, 'Climate Change Litigation: An Explanatory Approach (or Bringing Grievance Back In)' in F Fracchia and M Occhiena (eds), *Climate Change: La Riposta del Diritto* (Editoriale Scientifica 2010) 421.

<sup>22</sup>See *ibid.*

<sup>23</sup>See M Jakob et al, 'How Trade Policy Can Support the Climate Agenda' (2022)

376 *Science* 1,401; Susanne Droege et al, 'The Trade System and Climate Action: Ways Forward Under the Paris Agreement' (2017) 13 *South Carolina Journal of International Law and Business* 195.

<sup>24</sup>A Patt et al, 'International Cooperation' in PR Shukla et al (eds), *Climate Change 2022: Mitigation of Climate Change: Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC 2022) 14–71.

<sup>25</sup>See Jakob et al (n 23).

<sup>26</sup>See C Brandt, 'Trade Elements in Countries' Climate Contributions under the Paris Agreement' (International Centre for Trade and Sustainable Development [ICTSD] 2017).

<sup>27</sup>See WTO, 'Environmental Database' <<https://edb.wto.org/>>.

<sup>28</sup>See WTO, 'Environmental Database for 2020' (2022) Note by the Secretariat WT/CTE/EDB/20, at 5.

<sup>29</sup>*Ibid.* 8.

<sup>30</sup>*Ibid.* 21.

<sup>31</sup>See JS Shapiro, 'The Environmental Bias of Trade Policy' (2021) 136 *Quarterly Journal of Economics* 831.

use of these two sets of trade measures are therefore critical to addressing climate change. They may impede climate action by restricting the discretion of countries to adopt climate-friendly trade measures and/or by encouraging the adoption of trade-promoting, climate-unfriendly measures.<sup>32</sup> Trade rules may also help catalyse climate action by allowing the adoption of climate-friendly trade measures and/or prohibiting the adoption of climate-unfriendly trade measures.<sup>33</sup>

These possibilities enable us to envisage at least three scenarios for trade-related climate change disputes. First, a dispute can be brought against climate-friendly trade measures driven by trade concerns. The complainants in such disputes typically challenge the adoption of a climate-friendly but trade-restrictive measure alleging its inconsistency with international trade law. As we will see shortly, the climate litigation literature refers to such disputes as ‘anti-climate litigation’. Second, a dispute can be brought against the lack (or inadequacy) of climate-friendly trade measures. As noted above, there are several trade measures that can help tackle climate change such as the removal of barriers to trade in renewable energy technologies. A WTO member, in principle, can file a dispute against another WTO member that has introduced or maintained a barrier to trade in such technologies. Such disputes would qualify as pro-climate litigation insofar as they are driven by climate change concerns. Third, a dispute can be brought against climate-unfriendly trade measures. Such disputes typically involve complaints filed against a WTO member that adopts climate-unfriendly trade measures (e.g. fossil fuel subsidies). Such disputes would qualify as pro-climate litigation. We can also imagine a fourth scenario involving disputes against the lack of trade-promoting but climate-unfriendly measures (e.g. low tariffs on fossil fuels). However, such disputes overlap and fall under the first scenario as the underlying trade measure would be a trade-restrictive climate-friendly measure (e.g. high tariffs on fossil fuel products).<sup>34</sup>

The question as to whether the DSS could and should serve as a forum for climate litigation is therefore a question of whether it could and should resolve disputes that may arise under any of the three scenarios outlined above. I will attempt to answer these questions in Sections 3 and 4 below by adopting the categorization of pro-climate and anti-climate litigation.<sup>35</sup> The former refers to climate litigation initiated to engender policy change.<sup>36</sup> The main motivation behind such

litigation is to induce the adoption of more ambitious climate legislation or the implementation of existing legislation. Such cases are typically initiated by individuals or civil society organizations against governments. In the context of international trade law, pro-climate litigation may take the form of a claim against a WTO member for failing to take (adequate) climate-friendly trade measures (Scenario 2) or for adopting a climate-unfriendly trade measure (Scenario 3). Such claims have never been brought before the DSS. As we will see in Section 3, this is primarily because the WTO lacks norms that impose a direct obligation to address climate change. The absence of such an obligation makes it difficult (if not impossible) for potential complainants to find legal grounds to challenge the lack or insufficiency of trade-related climate action.

Anti-climate litigation refers to climate litigation initiated to resist the adoption of new climate policies or laws.<sup>37</sup> The complainants in such litigation (e.g. individuals, private companies and investors) typically allege the inconsistency of new (more stringent) climate laws and policies with constitutional or other norms. This type of climate litigation is common at the international level.<sup>38</sup> Investors have brought several of such cases relying on investment treaties.<sup>39</sup> Much of the trade and environment disputes in the multilateral trading system also concern cases brought against the adoption of new environmental laws and policies claiming their inconsistency with multilateral trade rules. The classic trade and environment disputes from *US–Tuna* to *US–Gasoline* and *US–Shrimp* involve claims against environment/climate-friendly trade measures. In all these disputes, the complainants challenged the inconsistency of the trade-related environmental measures with international trade rules. The parties to or the adjudicators of these disputes rarely made explicit reference to climate change. Environment and climate change concerns came into the picture in these disputes in the form of justifications the respondents invoked to justify their GATT/WTO-inconsistent measures. The lack of an express reference to climate change and the fact that climate change was only a peripheral concern leaves all these disputes outside the narrow definitions of climate litigation. However, some of the recent trade and environment disputes make more explicit references to climate change. In *India–Solar Cells*, for example, India unsuccessfully tried to justify its renewable energy local content requirements (LCRs) as measures necessary to secure compliance with its obligations (under national and international laws), inter alia, relating to climate change.<sup>40</sup> This and other trade and environment cases demonstrate that the DSS has already served as a forum for ‘climate litigation’ at least in the broad sense of the term. However, climate change remained a peripheral concern in all these disputes. The subsequent

<sup>32</sup>Patt et al (n 24) 14–71.

<sup>33</sup>*ibid.*

<sup>34</sup>Climate change-related trade disputes over trade remedies such as anti-dumping duties and countervailing duties do not fit perfectly into these three scenarios. They are also difficult to characterize as anti- or pro-climate litigation without considering the dumped or subsidized products at issue. On the one hand, litigation over anti-dumping or countervailing duties against dumped or subsidized fossil fuels, for example, can be characterized as anti-climate action litigation (Scenario 1) given the adverse effects of dumped or subsidized fossil fuel products on climate change. On the other hand, disputes over dumped or subsidized renewable energy equipment can be characterized either as pro- or anti-climate action litigation depending on whether one considers such duties as climate-unfriendly (Scenario 3) or climate-friendly (Scenario 1) trade measures, respectively.

<sup>35</sup>See A Savaresi, ‘Inter-State Climate Change Litigation: “Neither a Chimera nor a Panacea”’ in Alogna et al (n 1) 366; Alogna et al (n 17) 19. See also J Peel and HM Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press 2015) 5 (categorizing climate litigation along the same lines as ‘proactive’ [litigations that seek to promote climate regulation] and ‘antiregulatory’ [litigations that seek to oppose existing or proposed regulatory measures]).

<sup>36</sup>See Savaresi (n 35) 366.

<sup>37</sup>Anti-climate litigation is also referred to as ‘anti-regulatory’ and ‘defensive’ litigation. See DL Markell and JB Ruhl, ‘An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?’ (2011) 64 Florida Law Review; NS Ghaleigh, ‘“Six Honest Serving-Men”: Climate Change Litigation as Legal Mobilization and the Utility of Typologies’ (2010) 1 Climate Law 31.

<sup>38</sup>See Savaresi (n 35) 367.

<sup>39</sup>See Kyla Tienhaara et al, ‘Investor-State Disputes Threaten the Global Green Energy Transition’ (2022) 376 Science 701; Savaresi (n 35) 366.

<sup>40</sup>See *India–Certain Measures Relating to Solar Cells and Solar Modules* (Appellate Body Report) WT/DS456/AB/R (14 October 2016) (*India–Solar Cells*).

section considers the prospect of disputes before the DSS that feature climate change more prominently.

### 3 | PROSPECTS OF TRADE-RELATED CLIMATE LITIGATION AT THE WTO

#### 3.1 | Trade and climate change at the WTO

Trade disputes have always been influential in the debate over the role of the international trade regime in tackling climate change and other environmental concerns. Although this debate predates the emergence of formal disputes, the legal aspect of the debate began in earnest with the emergence of trade and environment disputes. In one of the early and highly controversial disputes, the dispute settlement system of the GATT stirred great controversy by ruling against the United States' (US) bans on the importation of tuna to protect dolphins from certain harmful fishing practices in the high seas.<sup>41</sup> These decisions drew much criticism from environmental groups against the international trade regime and put pressure on trade negotiators to better align international trade rules with climate change and other environmental concerns.<sup>42</sup>

Such pressure and other parallel developments within the international climate change regime brought about significant substantive and procedural developments in the multilateral trading system at the Uruguay Round (1986–1994) that inter alia established the WTO. The introduction of environmental exceptions into newly introduced trade agreements and the recognition of sustainable development that protects and promotes environment were the major substantive developments.<sup>43</sup> The Uruguay Round also led to the adoption of the Marrakesh Decision on Trade and Environment that established the Committee on Trade and Environment (CTE) with a mandate to identify areas of mutual supportiveness between trade and the environment for future negotiations.<sup>44</sup> Some trade and environment issues eventually made it into the trade and environment package of the Doha Development Agenda (DDA).<sup>45</sup> However, like in most other areas, the political paralysis in multilateral trade negotiations meant that the international trade regime made limited if any progress on the legislative front in addressing climate change and other environmental issues over the last two decades.

Much of the progress within the multilateral trading system has taken place either in the form of informal mechanisms such as policy discussions and experience sharing within the CTE or trade and environment litigation through the DSS. The classic trade and environment disputes such as *US–Shrimp*, in which the Appellate Body eventually accepted the justification that the US' trade-restrictive environmental measures were necessary for the protection of exhaustible natural resources within the meaning of Article XX(g) GATT, created policy space within the multilateral trade rules to pursue environmental protection.<sup>46</sup> However, most trade and environment disputes had little or no reference to climate change.

As van Asselt points out, the interaction between trade and climate change historically received marginal attention, and it is only over the last few years that it started to receive greater attention within the multilateral trading system.<sup>47</sup> Efforts to tackle climate change through the multilateral trading system are being pursued on multiple fronts. The most prominent of these are efforts to reduce barriers to trade in environmental goods and services. The IPCC identified the liberalization of trade in environmental goods and services as measures that 'may both lower trade barriers and potentially bring about GHG emission reductions'.<sup>48</sup> WTO members launched the negotiation on environmental goods and services in 2001 but failed to agree on the definition of environmental goods and services. The definitional disagreement undermined any progress and eventually led to the collapse of the negotiations.<sup>49</sup> Efforts to reinvigorate these negotiations by shifting from multilateral to plurilateral negotiations and narrowing the scope of the negotiations from environmental goods and services to just environmental goods also met the same fate.<sup>50</sup> A group of like-minded WTO members launched the plurilateral trade negotiations on environmental goods in 2016 but made little to no progress. Recent years are seeing interest and efforts to reinvigorate these negotiations, but there is no tangible development on this front yet.<sup>51</sup> Another issue of particular importance to tackling climate change is fossil fuel subsidy reform. Studies have long established the adverse effects of fossil fuel subsidies on climate change.<sup>52</sup> There have also been several intergovernmental initiatives to tackle fossil fuel subsidies since the 2009 G20 Leaders' statement to phase out inefficient fossil fuel subsidies.<sup>53</sup> Much of these early efforts bypassed the WTO, but recent years have seen some progress towards tackling

<sup>41</sup>See *United States—Restrictions on Imports of Tuna (US—Tuna I)* (GATT Panel Report) DS21/R-39S/155 (3 September 1991) (not adopted); *United States—Restrictions on Imports of Tuna (US—Tuna II)* (GATT Panel Report) DS29/R (16 June 1994) (not adopted).

<sup>42</sup>See K Kulovesi, *The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation* (Kluwer 2011) 87 (noting that the rulings 'provoked a furious reaction and led many environmentalists to believe that the GATT/WTO regime was dedicatedly and irrevocably biased in favour of free trade'). See also HL Thaggert, 'A Closer Look at the Tuna-Dolphin Case: "Like Products" and "Extrajurisdictionality" in the Trade and Environment Context' in J Cameron, D Geradin and P Demaret (eds), *Trade & the Environment: The Search for Balance* (Cameron May 1994) 83.

<sup>43</sup>See, e.g., Agreement on Subsidies and Countervailing Measures (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 14 (SCM Agreement) art 8; Agreement on Technical Barriers to Trade (adopted 15 April 1994, entered into force 1 January 1995) 1868 UNTS 120 (TBT Agreement) art 2.2.

<sup>44</sup>See WTO, 'Decision on Trade and Environment' MTN/TNC/45(MIN) (15 April 1994).

<sup>45</sup>See WTO, 'Ministerial Declaration' WT/MIN(01)/DEC/1 (14 November 2001) (Doha Declaration).

<sup>46</sup>See *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (Appellate Body Report) WT/DS58/AB/R (6 November 1998) (*US—Shrimp*); Howse (n 4).

<sup>47</sup>van Asselt (n 2).

<sup>48</sup>Patt et al (n 24) 14–73.

<sup>49</sup>See M Wu, 'The WTO Environmental Goods Agreement: From Multilateralism to Plurilateralism' in P Delimatsis (ed), *Research Handbook on Climate Change and Trade Law* (Edward Elgar 2016) 285; J Bacchus and I Manak, 'Free Trade in Environmental Goods Will Increase Access to Green Tech' (2021) 80 *Free Trade Bulletin* 1.

<sup>50</sup>Wu (n 49); Bacchus and Manak (n 49).

<sup>51</sup>See, e.g., WTO, 'WTO Trade and Environmental Sustainability Structured Discussions: Meeting Held on 5 March 2021, Informal Summary by the Coordinators' INF/TE/SSD/R/1 (15 March 2021); WTO, 'WTO Trade and Environmental Sustainability Structured Discussions: Meeting Held on 26, 27 and 28 May 2021, Informal Summary by the Coordinators' INF/TE/SSD/R/2 (10 June 2021).

<sup>52</sup>See B Larsen and A Shah, 'World Fossil Fuel Subsidies and Global Carbon Emissions' (World Bank 1992).

<sup>53</sup>See G20, 'Leaders' Statement: The Pittsburgh Summit, 24–25 September 2009' <<https://www.oecd.org/g20/summits/pittsburgh/G20-Pittsburgh-Leaders-Declaration.pdf>>.

fossil fuel subsidies within WTO.<sup>54</sup> However, much of these efforts remain informal and have not yet produced concrete legal commitments to phase out environmentally harmful fossil fuel subsidies.

The lack of progress on the legislative front to address climate change issues within the multilateral trading system is once again drawing attention towards the judiciary. Would WTO members resort to the DSS to tackle climate change in the multilateral trading system? If so, what kind of trade-related climate litigation might arise? Would the extant substantive and procedural rules allow for such litigation to happen? The remainder of this section addresses these questions in two parts. First, I consider the likelihood of pro-climate litigation in the multilateral trading system (Section 3.2). Second, I examine the prospect of anti-climate litigation in the multilateral trading system (Section 3.3).

### 3.2 | Pro-climate international trade litigation

In Section 2, I noted that pro-climate international trade litigation may take the form of a complaint against failure to take (adequate) climate-friendly trade measures or against climate-unfriendly trade measures. No such complaint has ever been filed under the multilateral trading system. Understanding the reasons behind the absence of this type of disputes would help us gauge the prospects of pro-climate disputes. No WTO member brought a formal complaint against another WTO member for failure to take adequate climate-friendly trade measures, primarily because there is no obligation under WTO law that requires WTO members to take such measures. The WTO has no agreement that requires WTO members to eliminate barriers to trade in environmental goods and services (despite efforts to do so over the last two decades). Nor are there rules that require WTO members to impose BCAs or other climate-friendly trade measures outlined in Section 2. In fact, a recent study found that international trade rules are biased towards carbon-intensive goods.<sup>55</sup> According to this quantitative study, 'import tariffs and nontariff barriers are substantially lower on dirty than on clean industries'.<sup>56</sup> In the absence of rules that require the adoption of climate-friendly trade measures, WTO members will find it difficult if not impossible to find a legal basis to initiate a pro-climate international trade litigation against another WTO member for its failure to take (adequate) climate-friendly trade measures.

The same is true for litigation against climate-unfriendly trade measures. Existing WTO rules do not prohibit or restrict the use of climate-unfriendly trade measures such as fossil fuel subsidies. This lack of a legal basis is one of the factors that contributed to the absence of legal dispute on fossil fuel subsidies in the multilateral

trading system. By contrast, subsidies to renewable energy technologies have been the subject of several trade disputes.<sup>57</sup>

One may argue that a direct obligation to adopt climate-friendly trade measures or to remove a climate-unfriendly trade measure is not necessary to initiate pro-climate international trade litigation. For example, the complainants may rely on general obligations. However, international trade law currently does not impose such obligations. The only relevant general provision is the preambular statement on sustainable development and the objective to protect and preserve the environment.<sup>58</sup> The Appellate Body in *US–Shrimp* underlined that this preambular statement serves an interpretive guide.<sup>59</sup> However, this preambular statement is unlikely to form an adequate legal basis for a pro-climate trade dispute. India invoked this preambular statement to justify its renewable energy LCRs in *India–Solar Cells*, but both the Panel and the Appellate Body rejected its argument that the preamble to the Marrakesh Agreement constitutes 'laws and regulations' within the meaning of the Article XX(d) GATT.<sup>60</sup> To be sure, neither the panel nor the Appellate Body directly assessed the normativity of the preamble to the Marrakesh Agreement. Their analysis was limited to determining whether the preamble to the Marrakesh Agreement and the other three international instruments that India invoked to justify its otherwise GATT-inconsistent measures had direct effect India. Having found that none of the four instruments had a direct effect, they concluded that they are not laws and regulations within the meaning of Article XX(d) GATT. However, the panel's remark that 'laws and regulations' do not include 'general objectives' directly speaks to the preambular language on sustainable development.<sup>61</sup> While preambular language helps inform the interpretation of WTO agreement and provisions, it offers an inadequate legal basis for a formal legal complaint against the lack of climate-friendly trade measures or the adoption of climate-unfriendly trade measures on its own.

It is worth noting that WTO members may challenge climate-unfriendly trade measures out of trade or economic rather than climate change concerns to the extent that the climate-unfriendly measure is also trade-distortive. For example, the literature on fossil fuel subsidies has long established that general fossil fuel consumption subsidies do not only encourage wasteful energy consumption but also distort trade in energy-intensive products.<sup>62</sup> Energy-intensive industries such as steel and aluminium in fossil fuel consumption-subsidizing countries benefit from the subsidized prices of one of their major inputs. However, WTO members remained reluctant to

<sup>57</sup>See H Asmelash, 'Energy Subsidies and WTO Dispute Settlement: Why Only Renewable Energy Subsidies Are Challenged' (2015) 18 *Journal of International Economic Law* 261.

<sup>58</sup>See Marrakesh Agreement Establishing the World Trade Organization (signed 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154.

<sup>59</sup>See *US–Shrimp* (n 46) paras 129–154.

<sup>60</sup>See *India–Solar Cells* (n 40) para 5.149; *India–Certain Measures Relating to Solar Cells and Solar Modules* (Panel Report) WT/DS456/R (14 October 2016) (*India–Solar Cells*, Panel Report) para 7.311.

<sup>61</sup>See *India–Solar Cells*, Panel Report (n 60) para 7.311.

<sup>62</sup>Note that fossil fuel production subsidies also distort trade in fossil fuels and other energy intensive-products. See CH Slattery, 'Fossil Fueling the Apocalypse': Australian Coal Subsidies and the Agreement on Subsidies and Countervailing Measures' (2019) 18 *World Trade Review* 109; T Moerenhout and T Irschlinger, 'Exploring the Trade Impacts of Fossil Fuel Subsidies' (IISD 2020) GSI Report.

<sup>54</sup>For a comprehensive overview of recent initiatives to tackle fossil fuel subsidies at the WTO, see H Asmelash, 'The Regulation of Environmentally Harmful Fossil Fuel Subsidies: From Obscurity to Prominence in the Multilateral Trading System' (2022) 33 *European Journal of International Law* 1.

<sup>55</sup>See Shapiro (n 31).

<sup>56</sup>*Ibid.*

challenge such subsidies through the DSS for various reasons. The only exceptions are the two tit-for-tat disputes between China and the United States. In *China—GOES*, the United States challenged the imposition of anti-dumping and countervailing duties by China against grain oriented flat-rolled electrical steel (GOES) from the United States.<sup>63</sup> China imposed the countervailing duties having identified 11 support programmes that allegedly constitute direct and indirect specific subsidies to the steel industry. Three of the support programmes at issue were related to fossil fuels. China argued that the United States subsidized its steel industry directly through the provision of natural gas and electricity at below-market prices (through price regulation) and indirectly through the subsidization of the natural gas, electricity and coal production. The Appellate Body upheld the panel's finding that China imposed the countervailing duties without sufficient evidence of the existence of either 'financial contribution', 'benefit' or 'specificity' within the meaning the Agreement on Subsidies or Countervailing Duties (SCM Agreement). In *China—Primary Aluminium*, the United States challenged several subsidy programmes benefiting Chinese primary aluminium producers.<sup>64</sup> One of the subsidies at issue was the provision of coal for less than adequate remuneration. The United States alleged that these subsidies are causing adverse effects to its interests within the meaning of Article 5(c) of the SCM Agreement.<sup>65</sup> However, this case remained at the consultations stage since it was filed in January 2017. These two disputes indicate both the potential and limitations of challenging climate-unfriendly and trade-distortive measures in the multilateral trading system. On the one hand, their mere existence suggests that there is a potential for such disputes in the future. On the other hand, China's defeat in *China—GOES* and the abandonment of the claim in *China—Primary Aluminium* suggests the difficulty of challenging such measures under the extant trade rules.

A reasonable inference from the preceding discussion is that the chance of pro-climate international trade litigation largely depends on legal reform within the multilateral trading system. The introduction of new rules that require the adoption of climate-friendly trade measure or that prohibit or restrict the use of climate-unfriendly trade measure would provide the necessary legal basis to initiate pro-climate international trade litigation in the future. Ongoing efforts to introduce new rules on environmental goods and services and fossil fuel subsidies are therefore crucial to the prospect of pro-climate international trade litigation.

Besides these substantive obstacles, pro-climate international trade litigation also faces significant procedural and other political economy hurdles. The first hurdle from a procedural point of view is the issue of standing. Who can bring a pro-climate case before a DSS? Under the Dispute Settlement Understanding, only WTO members have standing to file a complaint before the DSS. This means that a pro-climate international trade litigation must be initiated by a WTO

member. That other actors such as individuals and nongovernmental organizations have no standing undermines the likelihood of such litigation within the multilateral trading system. Inter-State disputes are historically limited. The global public good nature of climate change further undermines the likelihood of a WTO member filing a formal complaint against another WTO member for failing to adopt a climate-friendly trade measure or for taking a climate-unfriendly trade measures. This is primarily because successful pro-climate litigation benefits all countries through the consequent climate action taken, but the costs of litigation (financial and others) are solely borne by the initiating country. The opportunity for free riding creates a collective action problem as countries may try to reap the benefits of pro-climate litigation without incurring the associated costs.<sup>66</sup> Johns and Pelc, for example, have shown that the likelihood of WTO members to initiate a formal trade dispute against a trade-restrictive measure is partly dependent on whether the economic effects of the measure are concentrated or diffused across countries.<sup>67</sup> They found that trade litigation constitutes a public good when the effects of the trade-restrictive measure are diffused, and WTO members are less likely to initiate a formal dispute against such measures.<sup>68</sup> The same is true for pro-climate litigation because the effects of climate-unfriendly trade measures and the lack (or inadequacy) of climate-friendly trade measures are diffused across the membership.

The last few years have seen the establishment of informal country groupings such as the Friends of Fossil Fuel Subsidy Reform (FFFSR), the Friends of Advancing Sustainable Trade (FAST) and the Trade and Environmental Sustainability Structured Discussions (TESSD). These coalitions have been proactive in addressing climate change and other environmental issues within the multilateral trading system. However, most of their activities remain on tackling such issues through informal mechanisms such as the adoption of nonbinding statements, policy dialogues and information-sharing within the CTE and other WTO forums such as the Trade Policy Review Mechanism.<sup>69</sup> Their activities within the CTE, Trade Policy Review Mechanism and to a lesser extent within the Committee on Subsidies and Countervailing Measures (SCM Committee) indicate a strong interest in tackling climate change through the multilateral trading system. However, it remains unclear whether this could lead to the filing of a formal pro-climate trade dispute even if we were to assume that there are adequate legal bases to challenge the lack of (adequate) climate-friendly trade measure or the adoption of climate-unfriendly trade measures. The good thing about the DSS is that WTO members do not have to show a direct interest to file a WTO dispute. Even if establishing such an interest was necessary, this would not be an obstacle given that climate change is a universal problem that affects

<sup>66</sup>On collective action problems, see M Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press 2002).

<sup>67</sup>See L Johns and KJ Pelc, 'Free Riding on Enforcement in the World Trade Organization' (2018) 80 *Journal of Politics* 873.

<sup>68</sup>See *ibid.* See also CP Bown, 'Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders' (2005) 19 *World Bank Economic Review* 287 (on free-riding in the WTO dispute settlement system); J Paine, 'International Adjudication as a Global Public Good?' (2018) 29 *European Journal of International Law* 1,223 (on the public good nature of international adjudication).

<sup>69</sup>See Asmelash (n 54).

<sup>63</sup>See *China—Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States* (Appellate Body Report) WT/DS414/AB/R (16 November 2012).

<sup>64</sup>See WTO, 'DS519: China—Subsidies to Producers of Primary Aluminium' WT/DS519/1 (2017).

<sup>65</sup>*ibid.*



all countries and communities. However, there are several other factors that affect the decision of a WTO member to initiate a formal trade dispute. Such factors include the cost of litigation, risk of injuring diplomatic relations, the risk of counter-complaints and precedent-setting.<sup>70</sup> The legal and administrative costs of initiating a formal trade dispute and their impact on dispute initiation are widely documented in the literature.<sup>71</sup> Such costs tend to discourage countries that do not have in-house legal expertise (and hence rely on outside legal counsel) from initiating trade disputes at the WTO. Studies have shown that the costs of litigation also influence the decision of even advanced economies such as the European Union (EU) and the United States to initiate a trade dispute.<sup>72</sup> Initiating a formal trade dispute also creates diplomatic tension with the respondent country. Studies have also shown the prevalence of countersuits or tit-for-tat disputes at the WTO.<sup>73</sup> Pervez, for example, found countersuits to be one of the key reasons why a significant number of trade disputes are abandoned at the consultations stage.<sup>74</sup> These factors are likely to limit the prospect of pro-climate international trade litigation.

Granting non-State actors access to the DSS would alleviate some of these procedural considerations, but this is unlikely under the current political climate in the international trade regime.<sup>75</sup> The issue of standing has been the subject of a longstanding debate in international trade scholarship, and the fact that it took a long time for the trading system to accept intervention by nongovernmental actors and open its hearings to the public suggest that this is not politically viable. Therefore, from a procedural point of view, the prospect of pro-climate international trade litigation largely depends on WTO members that have been active in calling for action against environmentally harmful trade measures (e.g. members of the Friends of Fossil Fuel Subsidy Reform such as New Zealand and Norway) to take the lead by initiating such disputes.

To sum up, the substantive and procedural considerations outlined above limit the prospects of pro-climate international trade litigation. The chance for such litigation largely depends on future legislative reform and the determination of WTO members such as those that formed the FFSR, FAST and TESSD to embrace climate litigation as a valuable instrument in their effort to tackle climate change within the multilateral trading system.

### 3.3 | Anti-climate international trade litigation

In contrast to pro-climate international trade litigation, the chances of anti-climate international trade litigation are high. Extant international trade law (and international economic law more broadly) is more suited for anti-climate than pro-climate litigation. This is mainly because much of international economic law (including international investment, monetary, finance and trade law) was designed primarily with a view to advance economic than environmental or climate change policy objectives. Due to their primary focus on tackling measures that restrict trade, investment, etc., international economic rules are more likely to provide the necessary legal bases for a legal suit against a climate-friendly and trade/investment-restrictive measure (anti-climate litigation) than for a legal suit against a climate-unfriendly and trade/investment promoting measure (pro-climate litigation). I already noted that international investment arbitration has been used by foreign investors to challenge climate-friendly government measures. The international trade regime has also seen its own fair share of legal disputes brought against trade-restrictive environmental measures (see Section 2). Van Asselt identified the recent spate of legal disputes over renewable energy LCRs as 'climate change-related litigation'.<sup>76</sup> Such disputes undoubtedly have considerable implications for climate change. Climate change also featured more explicitly in one of these cases (i.e. *India–Solar Cells*). However, these disputes do not neatly fall into the categories of pro- or anti-climate action litigation. First, in all the disputes, the challenged measures were LCRs.<sup>77</sup> Such requirements are put in place to retain the economic benefits (e.g. job creation) from the subsidization of renewables at the local level. The respondents in these disputes (Canada, India and the United States) typically conditioned eligibility to their generous renewable energy subsidy programmes on the use of locally produced renewable energy generation equipment (e.g. wind turbines and solar panels). Renewable electricity producers may participate in the subsidy programmes only insofar as they establish that a certain percentage of their inputs were locally sourced. However, there is no conclusive evidence on the effectiveness of such requirements in promoting the development and deployment of renewables to consider them as climate-friendly trade measures.

On the one hand, they help governments justify the subsidization of renewables to their constituencies not only on climate change but also on economic grounds. The proponents of renewable energy LCRs claim that such requirements promote local renewable energy equipment manufacturing, attract renewable energy investment and create green employment opportunities that help alleviate potential opposition to the subsidization of renewables.<sup>78</sup> It has also been argued that LCRs could help reduce dependence on foreign renewable energy

<sup>70</sup>See more generally CL Davis, *Why Adjudicate? Enforcing Trade Rules in the WTO* (Princeton University Press 2012).

<sup>71</sup>See R Brutger, 'Litigation for Sale: Private Firms and WTO Dispute Escalation' (2007) 4 (noting that 'the average cost of litigation in most WTO cases is around one million dollars per year for the duration of the dispute').

<sup>72</sup>See *ibid.*

<sup>73</sup>See ML Busch and E Reinhardt, 'Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement' in DLM Kennedy and JD Southwick (eds), *The Political Economy of International Trade Law* (Cambridge University Press 2002) 471.

<sup>74</sup>See F Pervez, 'Countersuits and the Politics of Abandoned WTO Trade Disputes' (2015).

<sup>75</sup>Granting access to the DSS for nongovernmental actors such as environmental NGO would help address some of the procedural issue such as the risks of precedent-setting, counterclaims and diplomatic tensions that otherwise may dissuade governments from filing a trade-related pro-climate claim at the WTO. These consideration are unlikely to influence a nongovernmental actor's decision to initiate a dispute.

<sup>76</sup>See van Asselt (n 2) 441–448.

<sup>77</sup>For an overview of these disputes, see H Asmelash, 'The First Ten Years of WTO Jurisprudence on Renewable Energy Support Measures: Has the Dust Settled Yet?' (2022) 21 *World Trade Review* 455.

<sup>78</sup>See JC Kuntze and T Moerenhout, 'Local Content Requirements and the Renewable Energy Industry: A Good Match?' (International Centre for Trade and Sustainable Development 2013); T Meyer, 'How Local Discrimination Can Promote Global Public Goods' (2015) 95 *Boston University Law Review* 1937.

equipment and ensure enough domestic supply. India unsuccessfully tried to justify its LCRs on this ground in *India–Solar Cells*.<sup>79</sup> The Appellate Body was not convinced that renewable energy equipment were products of local or general short supply. It concluded that India could simply source such equipment from the international market. I argued elsewhere that this point of the Appellate Body has lost its force since the COVID-19 pandemic.<sup>80</sup> The global pandemic has shown that even ordinary products such as masks could become products of local or global short supply in times of emergency. Given that climate change is arguably an even greater emergency, renewable energy LCRs may pass as climate-friendly trade measures insofar as they help countries build their renewable energy equipment manufacturing capacity.

On the other hand, renewable energy LCRs are adopted as green industrial policies. Studies have shown that trade restrictions and distortions such as LCRs often end up increasing the price of renewable energy generation equipment and thereby reduce their deployment.<sup>81</sup> The reduced rate of deployment then cuts downstream renewable energy job opportunities. These considerations cast doubt on the characterization of renewable energy LCRs as climate-friendly trade measures and the dispute over such measures as anti-climate international trade litigation.<sup>82</sup> Indeed, it was these considerations that led Japan and the EU, the complainants in the first-ever WTO dispute over a renewable energy support programme that reached the Panel stage (i.e. *Canada–Renewable Energy*), to go out of their way to underline that the dispute should not be characterized as a ‘trade and environment dispute’.<sup>83</sup> Both Japan and the EU insisted that their complaint was against the discriminatory aspect of the FIT programme, not the programme itself; they hence argued that the dispute should rather be characterized as a ‘trade and investment’ dispute.<sup>84</sup> It is also important to note that neither Canada nor the United States (the respondents in *Canada–Renewable Energy* and *US–Renewable Energy*, respectively) attempted to justify their LCRs on environmental or climate change grounds.<sup>85</sup> India also curiously left out the popular environmental/climate change justifications under WTO law (i.e. Article XX(b) and XX(g) GATT) from the list of justifications it invoked in *India–Solar Cells* to justify its renewable energy LCRs.<sup>86</sup>

Irrespective of whether the existing renewable energy subsidy disputes count as anti-climate litigation, they indicate the trajectory of climate litigation in the international trade regime. Like trade and environment disputes, most trade-related climate litigation are likely to take the form of challenges against climate-friendly trade measure on the grounds of inconsistency with international trade rules. Van Asselt and other commentators anticipate that one such trade-restrictive climate-friendly measure would be BCAs.<sup>87</sup> BCAs received much attention in the trade and environment scholarship particularly in the aftermath of the refusal of the United States to join the Kyoto Protocol. Commentators suggested that that the EU and other developed country parties to the Kyoto Protocol should impose tariffs and countervailing duties on products from non-Kyoto parties such as the United States.<sup>88</sup> Initial discussion towards the imposition of such measures in the EU and subsequently in the United States prompted trade and environment scholars to consider the compatibility of such measures with WTO law in anticipation of a potential trade over BCAs.<sup>89</sup> However, as Kulovesi pointed out, these remained imagined rather than real disputes, as no country introduced BCAs.<sup>90</sup> This is now set to change with the EU’s proposed Carbon Border Adjustment Mechanism (CBAM)<sup>91</sup> and growing support for the adoption of BCAs in the United States, Canada and the United Kingdom. These recent developments have reinvigorated academic debate on the compatibility of such measures with the WTO law and raised expectations of anti-climate international trade litigation. BCAs typically take the form of import charges to level the competitive playing field and reduce the risk of carbon leakage.<sup>92</sup> As additional and/or potentially discriminatory charges, they are likely to raise compatibility issue with WTO rules and principles. The complainants in such disputes would likely challenge such measures as a violation of the principle of market access (Article II GATT) and/or nondiscrimination (Articles I and III GATT). It is equally anticipated that the respondents will invoke one of the classic environmental/climate change justifications contained in Article XX (b) and (g) GATT. The outcome of this and other potential anti-climate litigation will largely rest on the design and implementation of the trade-restrictive climate-friendly measure and the interpretation of the climate change-related exceptions contained in the WTO Agreements. It is therefore interesting to see how the EU not only designs and implements its CBAM but also tries to justify it under existing international trade rules. It is equally interesting to see how the crisis-hit DSS would handle such a sensitive issue.

<sup>79</sup>*India–Solar Cells* (n 40).

<sup>80</sup>Asmelash (n 68).

<sup>81</sup>See, e.g., C Ettmayr and H Lloyd, ‘Local Content Requirements and the Impact on the South African Renewable Energy Sector: A Survey-Based Analysis’ (2017) 20 *South African Journal of Economic and Management Sciences* 11.

<sup>82</sup>See, among others, A Cosbey and P Mavroidis, ‘A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO’ (2014) 17 *Journal of International Economic Law* 11; Meyer (n 78); Asmelash (n 57).

<sup>83</sup>See *Canada—Certain Measures Affecting the Renewable Energy Generation Sector* (Panel Report) WT/DS412/R, WT/DS426/R (24 May 2013) (*Canada–Renewable Energy*, Panel Report) para 7.7; WTO, ‘Canada—Measures Relating to the Feed-in Tariff Program (DS426): First Written Submission by the European Union’ (2012) (EU First Submission) (on file with author) para 2.

<sup>84</sup>See *Canada–Renewable Energy*, Panel Report (n 83); EU First Submission (n 83).

<sup>85</sup>See *Canada—Certain Measures Affecting the Renewable Energy Generation Sector* (Appellate Body Report) WT/DS412/AB/R, WT/DS426/AB/R (24 May 2013); *United States—Certain Measures Relating to the Renewable Energy Sector* (Panel Report) WT/DS510/R (27 June 2019).

<sup>86</sup>*India–Solar Cells* (n 40).

<sup>87</sup>van Asselt (n 2) 448–453.

<sup>88</sup>See, e.g., JE Stiglitz, *Making Globalization Work* (WW Norton & Co 2006) 177; J Bhagwati and PC Mavroidis, ‘Is Action against US Exports for Failure to Sign Kyoto Protocol WTO-Legal?’ (2007) 6 *World Trade Review* 299.

<sup>89</sup>See, e.g., H Horn and PC Mavroidis, ‘Border Carbon Adjustments and the WTO’ (2010) 53 *Japanese Yearbook of International Law* 19; Kateryna Holzer, ‘Trade and Climate Policy Interaction: Dealing with WTO Inconsistencies of Carbon-Related Border Adjustment Measures’ (National Centres of Competence in Research 2010); L Tamiotti, ‘The Legal Interface between Carbon Border Measures and Trade Rules’ (2011) 11 *Climate Policy* 1,202.

<sup>90</sup>See Kulovesi (n 3).

<sup>91</sup>See Commission (EU) ‘Proposal for a Regulation of the European Parliament and of the Council Establishing a Carbon Border Adjustment Mechanism’ COM(2021) 564 final, 14 July 2021.

<sup>92</sup>*ibid* 1–2.

Beyond BCAs, the likelihood of anti-climate trade litigation is set to increase as more countries start to adopt policy measures in their effort to combat the ever-deepening climate change crisis. The shift from a more top-down to a more bottom-up approach in international climate governance has left parties to the Paris Agreement to determine their own emission reduction targets and policy instruments to meet their targets. This opens an opportunity for countries to experiment and adopt different climate-friendly trade measures. Countries are also more likely to try to pursue both economic and climate change objectives through such measures (as we have seen in the case of renewable energy LCRs). This will further intensify the tension between trade and climate change and pose the trading system with the challenge of resolving such tension. The continued paralysis in multilateral trade negotiations will keep the pressure on the DSS to strike the right balance between trade and climate change concerns. The following section will consider whether we should entrust the DSS with the responsibility to do so or find alternative venues for adjudicating trade-related climate change disputes (if and when) they arise.

#### 4 | THE CASE FOR TRADE-RELATED CLIMATE LITIGATION AT THE WTO

The question whether the international trade regime should address climate change and other environmental concerns has been the subject of a long-standing debate.<sup>93</sup> The recognition of environmental protection and preservation as an overarching objective of the WTO partly resolved the debate and shifted its focus towards how best to ensure the mutual supportiveness of trade and climate change/environmental concerns. The CTE was accordingly established with a mandate to resolve potential conflicts between international trade rules and multilateral environmental agreements (MEAs) and identify areas of mutual supportiveness between the two.<sup>94</sup> This subsequently led to the inclusion of trade and environment issues such as environmental goods and services and fisheries subsidies in the Doha Round negotiations. The recent conclusion of the Agreement on Fisheries Subsidies reaffirms the continuation of the political consensus to tackle environmental issues within the multilateral trading system.

However, commentators have questioned the merits of entrusting the WTO with the responsibility to tackle climate change and mandating its DSS to decide on climate change-related disputes.<sup>95</sup> Recently, Charnovitz argued against efforts to address environmental issues at the WTO.<sup>96</sup> Two points lie at the heart of his argument. The first one is the many dysfunctions and poor track record of the WTO over the last two decades. Noting the failed Doha Round trade and

environment negotiations, he argued that ‘all the evidence points to the sad conclusion that the WTO should not be perceived as an institution capable of solving important non-trade problems’.<sup>97</sup> The breakdown in the legislative function of the WTO is undisputable, but the fact that the WTO recently managed to conclude the negotiations on fisheries subsidies (albeit after two decades) suggest that the multilateral trading system is still capable of delivering negotiated outcomes on key trade and environment issues. It is also important not to overlook the informal mechanisms (besides formally negotiated rules) through which the WTO addresses some of these issues. There is a growing trend within the multilateral trading system towards using informal mechanisms such as policy dialogue, exchanges of information, and experiences and peer review to tackle trade and environment issues. For example, I have demonstrated elsewhere how WTO members increasingly used these informal mechanisms to tackle environmentally harmful fossil fuel subsidies over the last few years.<sup>98</sup>

Charnovitz’ second point is that the WTO is better left to deal with international trade issues. He is of the view that ‘the WTO should stick to its constitutional mission to effectuate the goals of an open and rule-based trading system’ and ‘letting the WTO do its own job is not only a good idea for the world economy but is also a good idea for the global environment’.<sup>99</sup> This argument finds little support in WTO law and practice. The very first paragraph of the preamble to the Marrakesh Agreement establishing the WTO set out environmental protection and preservation as an overarching objective of the WTO. The WTO also embraced tackling environmental issues from its inception by establishing the CTE. Together with current efforts to revitalize the negotiations on environmental goods and foster discussions on a wide range of other trade and environment issues (i.e.d TESSD), the recent conclusion of the fisheries subsidies negotiations reaffirms the will and ability of the WTO membership to tackle environmental issues at the WTO. The fisheries subsidies agreement represents the first-ever agreement in the history of the multilateral trading system that favours environmental protection over trade promotion as its primary objective.<sup>100</sup> Moreover, given the close interaction between trade and nontrade issues such as climate change, it is also extremely difficult to address international trade issues in clinical isolation. It is this type of silo thinking that led to the fragmentation of international law in the first place and is unlikely to help the world resolve its current multifaceted health, economic and climate change crisis.

On whether the DSS should decide on climate change-related disputes, van Asselt cautioned against a stronger role for the DSS stating that some of the trade and climate change issues ‘probably *should not* be answered by WTO panels or the Appellate Body’.<sup>101</sup> His argument rests on two fundamental assumptions. The first one concerns the (un)willingness of the DSS to integrate nontrade concerns. He points

<sup>93</sup>See DC Esty, *Greening the GATT: Trade, Environment, and the Future* (Peterson Institute for International Economics 1994); DA Motaal, ‘Multilateral Environmental Agreements (MEAs) and WTO Rules Why the “Burden of Accommodation” Should Shift to MEAs’ (2001) 35 *Journal of World Trade* 1,215; JH Jackson, ‘World Trade Rules and Environmental Policies: Congruence or Conflict’ (1992) 49 *Washington and Lee Law Review* 1,227.

<sup>94</sup>See WTO, ‘Decision on Trade and Environment’ MTN/TNC/45(MIN) (15 April 1994).

<sup>95</sup>See Charnovitz (n 5); van Asselt (n 2).

<sup>96</sup>See Charnovitz (n 5).

<sup>97</sup>ibid 3.

<sup>98</sup>See H Asmelash, ‘The Regulation of Environmentally Harmful Fossil Fuel Subsidies: From Obscurity to Prominence in the Multilateral Trading System’ (2022) 33 *European Journal of International Law* 993.

<sup>99</sup>ibid.

<sup>100</sup>See WTO, ‘Agreement on Fisheries Subsidies’ (2022) WT/MIN(22)/33/WT/L/1144.

<sup>101</sup>See van Asselt (n 2) 457 (emphasis in original).

to the failure of the Panel in *EC–Biotech*<sup>102</sup> to seek recourse to relevant MEAs such as the Convention on Biological Diversity and the Cartagena Protocol as evidence of the DSS's limitation in integrating nontrade concerns. However, he also submits that 'the practice of the Appellate Body suggests an increasing accommodation of environmental concerns'.<sup>103</sup> First in *US–Gasoline* where it underlined that WTO law should not be interpreted in clinical isolation and then in *US–Shrimp* where it relied on MEAs to interpret the meaning of 'exhaustible natural resources', the Appellate Body has shown a willingness to incorporate environmental considerations in the resolution of trade disputes.<sup>104</sup> The Appellate Body even went out of its way to save the Canadian FIT programme from inconsistency with the SCM Agreement in *Canada–Renewable Energy* by performing what trade scholars criticized as 'legal acrobatics' and 'legal fiction'.<sup>105</sup> The Appellate Body may not have saved the FIT programme from WTO inconsistency in the end, and its benefit analysis may have been methodologically erroneous<sup>106</sup> but its willingness to integrate environmental considerations was axiomatic. It was indeed such willingness and judicial activism that eventually brought about its demise.<sup>107</sup> As Howse has demonstrated, the Appellate Body has made important jurisprudential moves that helped secure or expand the policy space governments have under extant WTO law to pursue nontrade objectives such as the protection of the environment.<sup>108</sup> It managed to do so during a 'period of intense diplomatic and political divisiveness and prevailing perception of impasse and malaise' in the multilateral trading system.<sup>109</sup> The failure of the *EC–Biotech* Panel to consult relevant MEAs is inadequate to show the DSS's limitation in integrating climate change-related considerations. The environmental credentials of the Appellate Body are strong enough to even suggest that it would have rectified this failure had the parties appealed the findings of the Panel. It is equally important to acknowledge that the DSS can only do as much. Its mandate is limited 'to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of

interpretation of public international law'.<sup>110</sup> The reference to customary rules of interpretation of public international law leaves the DSS with enough room to integrate climate change and other environmental considerations as was the case in *US–Shrimp*. However, the international climate change regime also needs to provide enough legal hooks for the DSS to rely on if it was to interpret existing international trade rules in line with environmental objectives. The fact that India could only find the preamble of the Marrakesh Agreement, the United Nations Framework Convention on Climate Change, the Rio Declaration on Environment and Development, and the United Nations General Assembly Resolution adopting the Rio + 20 outcome document to justify its subsidization of renewables in *India–Solar Cells* shows the limitations of the international climate change regime itself.<sup>111</sup> None of these international instruments even mention energy let alone call for the subsidization of renewable energy sources.

Van Asselt's second point of caution against mandating the DSS to resolve trade-related climate disputes concerns the WTO adjudicator's lack of 'relevant background in environmental science, law and/or policy'.<sup>112</sup> Charnovitz raises a similar point in the context of the WTO more generally, asking 'why relocate important environmental problems to a non-performing regime with no technical expertise to solve those problems?'.<sup>113</sup> The underlying concern here is that WTO panel and Appellate Body members are trade experts and hence carry a natural bias towards trade in resolving trade-related climate disputes. This is a valid concern. However, the solution lies not in moving trade-related climate change litigation away from the DSS, but in developing its climate change and environmental expertise. Applying this argument to other subject areas will exclude most international courts and tribunals from serving as venues for climate litigation. Nothing suggests that the adjudicators at other international courts and tribunals have a better background in climate change science or policy than the WTO adjudicators. To be sure, a specialized international climate change or environment court would be better placed to address the environment/climate change component of a trade-related climate dispute. However, not only do we not have such a court now but such a court would also still need to have the necessary expertise in trade to strike the right balance between trade and climate change/environmental concerns. Van Asselt found that the criteria for the selection of Panel and Appellate Body members are 'broad enough to include people with relevant climate expertise in panels or even the Appellate Body'.<sup>114</sup> The procedural rules contained in the DSU also allow the DSS to overcome its lack of expertise on climate change issues 'by calling upon relevant climate change-related experts or information'.<sup>115</sup> This is a better solution than moving

<sup>102</sup>See *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* (Panel Report) WT/DS291/R, WT/DS292/R, WT/DS293/R (21 November 2006).

<sup>103</sup>See van Asselt (n 2) 457.

<sup>104</sup>To be sure, the Appellate Body used MEAs only as interpretive guidance rather than applicable law. However, I would argue that this was mainly because there has never been a WTO dispute involving a direct contradiction between an MEA and a WTO Agreement. Kulovesi has shown that much of the trade and environment debate around the interaction between MEAs and WTO Agreements is imagined than reality. Had there been such a dispute, the Appellate Body would have been forced to apply the conflict rules of international law (such as *lex posterior* and *lex specialis*) as there is neither an explicit WTO provision that prevents the Appellate Body from applying MEAs nor a WTO specific conflict rules. See Kulovesi (n 3); J Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?' (2003) 37 *Journal of World Trade*; J Pauwelyn, 'Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO' (2004) 15 *European Journal of International Law* 575, 589.

<sup>105</sup>See Cosbey and Mavroidis (n 82), 12; L Rubini, "'The Good, the Bad, and the Ugly': Lessons on Methodology in Legal Analysis from the Recent WTO Litigation on Renewable Energy Subsidies' (2014) 48 *Journal of World Trade* 895, 916.

<sup>106</sup>For a cogent criticism of the Appellate Body's benefit analysis, see Rubini (n 105).

<sup>107</sup>See USTR, 'Report on the Appellate Body of the World Trade Organization' (United States Trade Representative 2020), at 69; A Bahri, "'Appellate Body Held Hostage': Is Judicial Activism at Fair Trial?' (2019) 53 *Journal of World Trade* 293; H Gao and W Zhou, "'Overreaching" or "Overreacting"? Reflections on the Judicial Function and Approaches of WTO Appellate Body' (2019) 53 *Journal of World Trade* 951.

<sup>108</sup>See Howse (n 4).

<sup>109</sup>*ibid.*

<sup>110</sup>Understanding on the Rules and Procedures Governing the Settlement of Disputes, Annex 2 to Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401 (DSU) art 3.2.

<sup>111</sup>See *India–Solar Cells* (n 40) Annex B-3 *ibid.*, paras 53–57.

<sup>112</sup>van Asselt (n 2) 458.

<sup>113</sup>Charnovitz (n 5) 4.

<sup>114</sup>van Asselt (n 2) 458.

<sup>115</sup>*ibid.* See also DSU (n 110) art 13.

trade-related climate disputes to a nontrade dispute settlement forum that suffers from the lack of expertise in international trade law/policy and the DSS's decades of institutional experience in resolving trade and environmental issues.

## 5 | CONCLUSIONS

The close interaction between international trade rules and environmental protection measures has made the DSS one of the most active venues for the resolution of environment-related international disputes over the last three decades. However, the fact that DSS remains largely an untested venue for trade and climate change disputes has raised the question whether it could and should serve as a venue for international climate litigation. This article sought to answer this question by categorizing trade-related international climate litigation into pro-climate and anti-climate international trade litigation. It has shown that there are significant substantive and procedural hurdles to initiating a pro-climate litigation before the DSS. The most prominent of these is the lack of legal obligations under extant international trade law to adopt climate-friendly trade measures (e.g. BCAs and the removal of barriers to trade in renewable energy technologies) and/or to abolish climate-unfriendly trade measures (e.g. fossil fuel subsidies). In the absence of such obligations, the prospect of pro-climate international trade litigation is limited to instances where climate-unfriendly trade measures are also trade restrictive or distortive and subject to current international trade rules. For example, although extant international trade law does not have energy-specific disciplines that prohibit the subsidization of fossil fuels, such subsidies can still be challenged under the general subsidy rules contained in the SCM Agreement insofar as they are contingent upon export performance or the use of domestic over imported products or adversely affect the (trade) interests of other WTO members. However, no such trade dispute has arisen so far particularly because of the form fossil fuel subsidies typically take and the difficulties associated with establishing their inconsistency with existing subsidy disciplines. The future of pro-climate international trade litigation is therefore highly dependent on developments on the legislative front.

Contrary to pro-climate litigation, the chance of anti-climate international trade litigation remains high. Such disputes arise out of the adoption of trade-restrictive or -distortive climate-friendly measures such as renewable energy subsidies and BCAs. NDCs to the Paris Agreement and environment-related notifications to the WTO show that many WTO Members have adopted or are planning to adopt climate-friendly trade measures.<sup>116</sup> For example, almost all countries currently subsidize renewables in one form or another.<sup>117</sup>

Some of these renewable energy support programmes have already been the subject of trade disputes and trade scholars expect CBAM to trigger a trade dispute once put in place.<sup>118</sup> The number of climate-friendly but trade-distortive or trade-restrictive measures (and hence trade and climate change conflicts) are set to increase as countries strive to adopt multifunctional policy measures that promise to respond to both economic and climate change objectives. This will in turn pile the pressure on the crisis-hit trade regime and its DSS to strike the right balance between trade and climate change concerns. Although some scholars have cast doubt on the ability and aptness of the WTO and its DSS to do so, this article argued that both the WTO and its DSS have the necessary mandate and institutional expertise to find the right balance. The WTO jurisprudence and practice offers ample evidence of the ability and willingness of the DSS to integrate nontrade considerations in the resolution of trade disputes. However, cases such as *India–Solar Cells* have shown that the judiciary can only do so much. No matter the ability and will of the judiciary, we should not take the interpretation of trade rules designed more than two decades ago with little climate change consideration as the first best approach to tackling climate change in the multilateral trading system. Indeed, as Bodansky opined, 'adjudication should be viewed as a complement rather than as a substitute for negotiation'.<sup>119</sup> The introduction of new trade rules that provide concrete legal grounds for brining pro-climate disputes and more robust legal shelter for trade-restrictive or trade-distortive climate-friendly measures is of particular importance to both the prospect and effectiveness of trade-related climate litigation.

In this regard, recent years have witnessed renewed impetus to revitalize the trade and climate change agenda by resurrecting the stalled negotiations on environmental goods, introducing disciplines on environmentally harmful fossil fuel subsidies, and so on. If these initiatives come to fruition, these developments will lessen the pressure on the WTO adjudicators to perform legal acrobatics to save climate-friendly trade measures from WTO inconsistency and provide much needed room to strike the right balance between trade and climate change considerations. Of course, the DSS itself needs to first overcome its current crisis. While it is not clear at this stage whether and in what form the Appellate Body will resurrect from the dead, one only hopes that it will return without losing much of its mandate and willingness to integrate climate change and other environmental considerations in the resolution of trade disputes.

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<sup>116</sup>See I Venzke and G Vidigal, 'Are Unilateral Trade Measures in the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism (CBAM)' in M den Heijer and H van der Wilt (eds), *Netherlands Yearbook of International Law 2020: Global Solidarity and Common but Differentiated Responsibilities* (TMC Asser Press 2022) 187.

<sup>119</sup>See Bodansky (n 1) 693.

<sup>116</sup>See WTO, 'Environmental Database' <<https://edb.wto.org/>>.

<sup>117</sup>See REN21, 'Renewables 2020 Global Status Report' (2020).

## DATA AVAILABILITY STATEMENT

Data sharing is not applicable to this article as no new data were created or analyzed in this study.

## ORCID

Henok Asmelash  <https://orcid.org/0000-0003-0336-3088>

## AUTHOR BIOGRAPHY

**Henok Asmelash** is an assistant professor at the University of Birmingham Law School. Prior to joining the University of Birmingham, he was a global postdoctoral fellow at New York University

(NYU) and a research fellow at the Max Planck Institute Luxembourg. He holds a PhD in International Law and Economics from the Bocconi University (Milan). His research interest lies within the broad field of international economic law with a particular emphasis on legal and policy issues at the intersection of trade, energy and the environment.

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